

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE,

Plaintiff,

Case No. C16-107-RAJ-MLP

V.

ORDER

MONSANTO COMPANY, *et al.*,

Defendants.

I. INTRODUCTION

This matter is before the Court on Defendants Monsanto Company, Solutia Inc., and Pharmacia LLC's ("Defendants"):

(1) "Motion for Protective Order to Prevent the Depositions Noticed by Plaintiff on December 1, 2022" (dkt. # 531); and

(2) "Motion for Protective Order re: Plaintiff's December 1, 2022 Discovery Requests (dkt. # 542) ("Defendants' Motions").

Defendants' Motions seek a protective order to prevent Plaintiff City of Seattle from proceeding with two depositions and to prohibit discovery requests served by Plaintiff on December 1, 2022, including:

(1) Plaintiff's Fourth Set of Requests for Production;

(2) Plaintiff's Second Set of Requests for Admission; and

(3) Plaintiff's First Set of Interrogatories (collectively, "Plaintiff's Discovery Requests").

1 Plaintiff City of Seattle has filed oppositions to Defendants' Motions (dkt. ## 537, 544),
 2 and Defendants submitted a reply on their deposition motion.¹ (Dkt. # 541.) The Court heard oral
 3 argument from the parties on Defendants' Motions on January 11, 2023. (Dkt. # 549.)

4 Having considered the parties' submissions, oral argument, the balance of the record, and
 5 the governing law, Defendants' Motions (dkt. ## 531, 542) are DENIED, as further explained
 6 below.

7 II. BACKGROUND

8 On October 13, 2022, this Court was referred portions of Defendants' pending Motion for
 9 Summary Judgment by the Honorable Richard A. Jones regarding the issues of: (1) whether the
 10 State of Washington released the City of Seattle's intentional public nuisance claim when the
 11 State of Washington settled its PCB lawsuit against Defendants in June 2020; and (2) whether
 12 res judicata otherwise bars the City of Seattle's public nuisance claim. (Dkt. # 503.) Defendants'
 13 pending Motion for Summary Judgment contends that the City's claim was released by the State
 14 of Washington in June 2020 when the State settled its lawsuit against Defendants for the same
 15 injuries alleged by the City, which Defendants contend binds the City by its terms, and that *res*
 16 *judicata* further acts to bar the City's claims. (*See* dkt. # 326 at 1, 43-48.)

17 On November 22, 2022, this Court issued a Report and Recommendation deferring ruling
 18 on Defendants' Motion for Summary Judgment to allow for limited discovery on the issue. (Dkt.
 19 # 519 at 7-8.) The Court authorized the parties until January 23, 2023, to conduct limited
 20 discovery regarding "the meaning of the terms of the State Settlement Agreement, the intent of

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 22 ¹ This matter was heard in an expedited manner based on this Court's previously authorized limited
 23 discovery and direction to the parties that the Court would hear any discovery issues arising during the
 limited discovery period pursuant to Local Civil Rule 7(i). (Dkt. # 519 at 8.) In the interest of having this
 matter heard in an expedited fashion, the Court did not authorize Defendants to file a reply to its motion
 for protective order for Plaintiff's Discovery Requests. (*See* dkt. # 543.)

1 the parties to the State Settlement Agreement, the scope of any release authorized by the State
 2 Settlement Agreement, and any other relevant surrounding circumstances.” (*Id.* at 8.)

3 As a result of this Court’s recommendation, on December 1, 2022, Plaintiff served its
 4 Discovery Requests and deposition notices. (*See* Second DeBord Decl. (dkt. # 542-1), Exs.
 5 A-D.) Plaintiff’s deposition notices seek testimony from a corporate representative of Defendants
 6 and from William B. Dodero, current Vice President and Assistant General Counsel of Bayer,
 7 who signed the State Settlement Agreement on behalf of Defendants. The depositions were
 8 previously noted for January 9 and 10, 2023, respectively. (*Id.* Exs. B, D.) On December 29,
 9 2022—despite this Court’s advisement to proceed under LCR 7(i)—Defendants submitted their
 10 motion for a protective order over the noticed depositions. (Dkt. # 531.)

11 On January 3, 2023, Defendants served objections and responses to Plaintiff’s Discovery
 12 Requests, largely setting forth objections premised on arguments brought in the pending Motions
 13 before the Court. (*See* Second DeBord Decl., Exs. E-F.) On January 4, 2023, Judge Jones
 14 adopted this Court’s Report and Recommendation and extended the parties’ limited discovery
 15 period to February 6, 2023. (Dkt. # 538.) Defendants subsequently filed their motion for a
 16 protective order on Plaintiff’s Discovery Requests on January 6, 2023.² (Dkt. # 542.)

17 III. DISCUSSION

18 Defendants argue that Plaintiff’s deposition notices and Discovery Requests: (1) seek
 19 irrelevant and extrinsic testimony and evidence; (2) seek privileged testimony and evidence; (3)
 20 exceed the scope of authorized discovery by the Court; and (4) improperly pursue discovery for

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 22 ² Defendants’ second protective order motion followed a meet and confer with Plaintiff in which Plaintiff
 23 had sought to file a motion to compel responses to its Discovery Requests. (*See* Daniel Decl. (dkt. # 545)
 at ¶¶ 5-7.) At that meet and confer, Defendants contended Plaintiff’s proposed motion to compel was not
 ripe as Plaintiff was seeking to enforce discovery issued pursuant to this Court’s Report and
 Recommendation, which was not approved by Judge Jones until January 4, 2023. (*Id.* at ¶ 7.)

1 trial. (See dkt. ## 531 at 5-8, 542 at 4-12.) Plaintiff argues that Defendants fail to demonstrate
 2 good cause to prevent Plaintiff's sought depositions. (Dkt. # 537 at 4.) In addition, Plaintiff
 3 requests that the Court order Defendants to respond to the Discovery Requests and to provide
 4 dates for the requested depositions. (Dkt. # 544 at 3.)

5 Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
 6 party's claim or defense and proportional to the needs of the case. Fed. R. Civ. P. 26(b). Under
 7 Rule 26(c), the Court may issue a protective order if the party seeking the order establishes
 8 "good cause" and the protective order is required "to protect a party or person from annoyance,
 9 embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).

10 "For good cause to exist, the party seeking protection bears the burden of showing
 11 specific prejudice or harm will result if no protective order is granted." *Phillips ex rel. Estates of*
 12 *Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). "Broad allegations of harm,
 13 unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test."
 14 *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (citation and internal
 15 quotations omitted).

16 **A. Motion for Protective Order re: Depositions**

17 First, Defendants argue that Plaintiff's sought discovery as to the deposition requests is
 18 irrelevant, extrinsic testimony because the State Settlement Agreement is clear and
 19 unambiguous, fully integrated, and fails to carve out Plaintiff's claims from the released claims.
 20 (Dkt. ## 531 at 5.) Defendants further contend that Plaintiff improperly seeks privileged
 21 testimony and evidence, in violation of the mediation privilege, attorney-client privilege, and
 22 work product doctrine, and that Plaintiff improperly seeks discovery for trial. (*Id.* at 4-8.)
 23

1 Plaintiff responds that Defendants' arguments lack the required specificity to satisfy the
 2 "extraordinary circumstances" standard for issuance of a protective order that would bar a
 3 deposition. (Dkt. # 537 at 4.) Plaintiff notes that Defendants in essence seek blanket protective
 4 orders, which fail to explain or elucidate exactly what privileges apply to Plaintiff's noticed
 5 topics or would otherwise prohibit factual questions. (*Id.* at 6.)

6 A party seeking to prevent a deposition carries "a heavy burden" to demonstrate why
 7 discovery should be denied, and absent "extraordinary circumstances" it is unusual for a court to
 8 prohibit the taking of a deposition. *See Rookaird v. BNSF Ry. Co.*, 2015 WL 11233096, at *1
 9 (W.D. Wash. July 8, 2015) (citing *In re Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct.
 10 19, 2011)); *see also Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)). To that end, "a
 11 strong showing is required before a party will be denied entirely the right to take a deposition."
 12 *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975); *see also United States EEOC v.*
 13 *Caesars Entm't, Inc.*, 237 F.R.D. 428, 432 (D. Nev. 2006) ("As a general rule, courts will not
 14 grant protective orders that prohibit the taking of deposition testimony.").

15 Defendants have failed to carry their burden to show the noticed depositions should not
 16 take place at all. Courts, including this District, generally will not grant blanket protective orders
 17 which prohibit the taking of deposition testimony absent some demonstration of "extraordinary
 18 circumstances." *See Rookaird*, 2015 WL 11233096 at *1. Here, the Court agrees with Plaintiff
 19 that the noticed depositions clearly seek relevant discovery within the scope of that which was
 20 previously authorized by the Court on the deferred summary judgment issue. (*See* dkt. # 519 at
 21 7-8.)

22 Furthermore, Defendants' current assertion of the mediation privilege, attorney-client
 23 privilege, and the work-product doctrine as to Plaintiff's deposition request are before this Court

1 in a vacuum. Though there are likely questions that Plaintiff can raise at the depositions which
 2 might call for objection on the basis of privilege, such instances are not presently before the
 3 Court on a record that allows for proper determination.³ Upon such instances, Defendants'
 4 attorney may object at the appropriate time and direct the witness not to reveal any privileged
 5 information, which will allow the Court the record and context necessary to evaluate any future
 6 arising disputes.

7 Finally, the Court notes that, on reply, Defendants cite to both *Lloyd Lifestyle Ltd. v.*
 8 *Soaring Helmet Corp.*, 2006 WL 753243 (W.D. Wash. 2006), and *McBride v. Medicalodges,*
 9 *Inc.*, 250 F.R.D. 581 (D. Kan. 2008), as instances where deposition notices to an attorney were
 10 quashed, or a protective order granted, because the requests facially sought privileged
 11 information. (See dkt. # 541 at 3.) However, *Lloyd* is inapposite as the deposition noticed in that
 12 case noticed opposing counsel, which called for “special scrutiny” of the general rule that
 13 protective orders that completely bar a deposition are disfavored. See *Lloyd*, 2006 WL 753243, at

14 * 1. Mr. Dodero, though an Assistant General Counsel for Bayer, is not opposing counsel in this
 15 litigation. Defendants also misapprehend the holding in *McBride* as the district court in that case
 16 in fact declined to grant a protective order on a broad assertion of attorney-client privilege and
 17 work product doctrine. See 250 F.R.D. at 587 (“The Court finds that the blanket assertions of
 18 attorney-client privilege and work product against the deposition topics are premature. The Court
 19 does not find that the topics on their face call for testimony invading the attorney-client privilege
 20 or attorney work-product doctrine.”).

21
 22
 23 ³ See *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) (noting that assertion of privilege
 must normally be raised “as to each record sought and each question asked so that . . . the court can rule
 with specificity”); see also *Sprint Commc'n. Co., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 529 (D.
 Kan. 2006) (finding blanket assertion of privilege before Rule 30(b)(6) deposition premature).

1 Defendants have failed to demonstrate that any “extraordinary circumstances” in this case
 2 merit barring Plaintiff’s noticed depositions. Accordingly, Defendants’ motion for a protective
 3 order on Plaintiff’s noticed deposition is denied.

4 **B. Motion for Protective Order re: 12/1/22 Discovery Requests**

5 Next, Defendants’ motion for a protective order regarding Plaintiff’s Discovery Requests
 6 largely reiterates the same arguments set forth as to the motion for protective order on Plaintiff’s
 7 noticed depositions.⁴ (*See* dkt. # 542 at 4-12.) Plaintiff again notes that Defendants seek blanket
 8 protective orders barring Plaintiff’s Discovery Requests, which similarly fail to explain what
 9 privilege prohibits Plaintiff’s specific production requests and/or sought answers to its requests
 10 for admission and interrogatories. (Dkt. # 544 at 7-8.)

11 As to Plaintiff’s Discovery Requests, the Court again agrees that Defendants’ Motion
 12 makes broad assertions of the mediation privilege, but fails to meaningfully engage in how the
 13 privilege specifically applies to the individual discovery requests. (*See* dkt. # 542 at 5-6.)
 14 Defendants similarly fail to set forth specific argument of how attorney-client privilege and/or
 15 work product doctrine apply to bar several of Plaintiff’s Discovery Requests other than cursory
 16 mentions that Plaintiff requests information which seeks Defendants’ counsel’s “litigation
 17 strategy” and “mental impressions.” (*See* dkt. # 542 at 7-9.) And despite Defendants’ repeated
 18 reservations to discovery being irrelevant or beyond the scope previously permitted by this
 19 Court, Plaintiff’s sought information at this juncture appears clearly relevant and proportional to
 20

21 ⁴ It appears the only different argument raised between Defendants’ Motions is that Defendants argue
 22 Plaintiff’s Discovery Requests improperly seek to re-litigate Plaintiff’s previous motion to strike
 23 Defendants’ affirmative defenses 10 and 82, and that because the Court denied that motion, “[Plaintiff] is
 not entitled to conduct discovery regarding these affirmative defenses and Defendants are entitled to a
 Protective Order on these Requests.” (Dkt. # 542 at 10-11.) In fact, the opposite is true. Because
 Defendants’ affirmative defenses were not stricken, the Court authorized limited discovery to ameliorate
 any potential prejudice to Plaintiff arising from not having previously conducted discovery on
 Defendants’ affirmative defenses 10 and 82. (*See* dkt. # 519 at 6.)

1 Plaintiff's need for discovery to present a defense to Defendants' release and *res judicata*
2 affirmative defenses. (See dkt. # 519 at 7-8.)

3 In any case, based on Defendants' representations at oral argument that Defendants have
4 only just recently begun to search for responsive documents to Plaintiff's Discovery Requests,
5 the Court's determination on any potential privilege assertions—or the potential waiver of such
6 privileges—would be premature. Therefore, based on the record before the Court, it is too early
7 at this time for the Court to determine if Plaintiff's Discovery Requests are improper based on
8 any applicable privilege and/or work-product doctrine to demonstrate good cause for a protective
9 order.

10 Accordingly, Defendant's motion for a protective order on Plaintiff's Discovery Requests
11 is also denied.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court hereby ORDERS that:

14 (1) Defendants' Motions (dkt. ## 531, 542) are DENIED;

15 (2) Defendants will provide Plaintiff available dates and times for the previously
16 noticed depositions of Mr. William Dodero and Defendants pursuant to Fed. R. Civ. P. 30(b)(6),
17 which will remain limited to the Court's previously authorized discovery topics. The Court will
18 make itself available to the parties to hear any discovery issues arising during the depositions
19 telephonically; and

20 (3) Defendants are provided until **February 4, 2023**, to supplement their responses to
21 Plaintiff's Fourth Set of Requests for Production, Second Set of Requests for Admissions, and
22 First Set of Interrogatories.

1 Pursuant to Fed. R. Civ. P. 26(b)(5) and Fed. R. Civ. P. 34(b)(2)(C), Defendants'
2 supplemental responses must state whether any documents will be produced or are being
3 withheld, the basis of any objection to production of such documents, and Defendants are to
4 provide a log for any documents withheld on the basis of any applicable privilege.

5 Dated this 12th day of January, 2023.

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7 MICHELLE L. PETERSON
8 United States Magistrate Judge